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JOHN T. FEY, C

IN THE

Supreme Court of the United States

October Term, 1956

No. 942

OTHELLO WASHINGTON,
Petitioner

v.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Othello Washington,
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United States of America,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Petitioner, Othello Washington, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case on March 28, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix B, hereto, *infra*, p. 18, is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 28, 1957. The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

QUESTIONS PRESENTED

1. Where a quantity of numbers (lottery) records was seized from defendant at time of his arrest for bribery, was it error to admit them into evidence where there was no denial that defendant was a gambler and when the defense was "entrapment"; and was defendant substantially prejudiced by the prosecution's argument to the jury that these records proved that defendant was a big numbers operator, and were evidence of a booming business.

2. Where on a hearing on a pretrial motion defendant in testifying, and over objection, and at the direction of the Court is ordered to give incriminating testimony on issues not pertinent or necessary to the motion, is such incriminating testimony admissible as a confession? More specifically, where defendant moves for return of property and files an affidavit claiming ownership of such property, and affidavit is uncontroverted, was is necessary to subject him to questions having no bearing on the ownership of the property claimed, and clearly intended to elicit incriminating answers bearing on conduct not connected with the claim to the property? And does objection to such questions on grounds other than self-incrimination constitute a waiver of the privilege against self-incrimination?

STATUTE INVOLVED

The statute involved is Section 22-704, District of Columbia Code (1951 Ed.), and is printed in Appendix A, *infra*, p. 17, 18.

STATEMENT OF THE CASE

Petitioner was charged with Monroe, a captain in the Metropolitan Police Department, and with one Chase in an indictment containing one count of conspiracy, and several counts of bribery (R 1-5). Prior to trial the indictment was dismissed as to Monroe on his motion, and after the opening statement of the government, the Court granted Chase's motion for judgment of acquittal. The government thereafter consented to dismissal of the conspiracy count as to petitioner and proceeded on the three substantive counts of bribery.

The principal prosecution witness was Todd O. Thoman, who, on the dates of the alleged briberies was a lieutenant on the gambling squad of the police department, testified on direct examination that on July 14, 1956 he had a conversation with Monroe who told him that petitioner wanted protection for his numbers business; that Monroe then gave him petitioner's telephone number; that later that evening he called petitioner and asked petitioner if Monroe had told petitioner about him; that petitioner interrupted him and said, "Oh, yeah, yeah, I understand. Where can I see you?"; that they arranged to and did meet in the District of Columbia later that evening; that Thoman got into petitioner's car where petitioner and he discussed protection for petitioner's office; that petitioner asked him what the price would be for protection and Thoman told him $500.00 a month; that petitioner stated that it was too steep, and Thoman then suggested $300.00; that petitioner then suggested $250.00 and that Thoman agreed to accept that amount; that petitioner did give him $250.00 on that occasion; that they agreed to meet at the same location a month from that date; that Thoman then gave petitioner his telephone number and petitioner gave Thoman his telephone number; that he, Thoman, turned this money over to his superior.

Thoman further testified that on July 26, 1954 petitioner telephoned him and advised him of the location of peti-

tioner's numbers office. On July 30, 1954 Thoman telephoned petitioner and advised him that he, Thoman, was leaving on a two week vacation and would be back in Washington on August 16, 1954; that on August 16, 1954 Thoman received a call from petitioner and they arranged to and did meet on August 17, 1954 at which time petitioner gave Thoman $260.00 which sum he turned over to his superior on August 18, 1954.

Thoman further testified that on September 8, 1954 he received a telephone call from petitioner in which they had a short conversation; that on September 14, 1954 Thoman telephoned petitioner and arranged to and did meet with petitioner in the same place, at which time petitioner paid Thoman $250.00; that shortly after the money was handed over to Thoman, Captain Layton, Thoman's superior, came over to the automobile; told petitioner to get out, searched him, took some money from him, and also some numbers slips and tapes.

On cross examination Thoman testified that he had formerly worked under Captain Monroe on the gambling squad; that on October 29, 1953 he had a conversation with Monroe in which he was asked if he, Thoman, would be interested in getting some money from gamblers, and Thoman told him he would; that at the time of this proposal of Monroe, Monroe was captain of No. 12 Precinct; that pursuant to this conversation, Thoman met Prather, another officer of the Metropolitan Police Department, at which meeting Prather handed Thoman some money with a list of addresses and telephone numbers of alleged gambling places; that this was on a Saturday and on Monday morning Thoman handed in that money to his superior and reported the incident to him; that thereafter he received instructions from both the United States Attorney and his superiors to continue on with his contacts.

Thoman further testified that the first time he heard of petitioner was when Monroe approached Thoman on July 14, 1954, although he had previously read his name in con-

nection with a Supreme Court case; that at the time Thoman first called petitioner in Virginia, Thoman knew that petitioner was on parole.

On redirect examination Thoman testified that Monroe was now in jail because of the bribery of Thoman and that Prather was a fugitive. In questioning Thoman, the prosecutor mentioned a letter Thoman had received from Prather, and on recross examination Thoman testified that the letter referred to all the persons who were arrested. The petitioner sought to introduce the letter but the Court refused to permit it.

Captain John B. Layton, Thoman's immediate superior at the time in question, testified that on the night of July 14, 1954, he observed Thoman leave an automobile registered to petitioner; that on the evening of September 14, 1954 he searched Thoman and removed a billfold and some change from Thoman's pockets; that later Layton approached Thoman's automobile and saw petitioner next to Thoman; that Thoman identified petitioner and produced the money which he stated petitioner had given him; that petitioner denied knowing anything about the money; that he searched petitioner and found papers and tapes commonly used in the numbers game. Over objection, the papers were introduced, and the witness, Layton, was allowed to testify that the tapes indicated a gross for one day of $4,049.12 and a net win of $2,525.12.

Deputy Chief Lutz testified that on August 17, 1954 he observed petitioner's automobile near the place where Thoman's automobile had been parked; that the next day Thoman turned over $260.00 to him; that Thoman turned over to him $250.00 on July 22, 1954 and $250.00 on September 14, 1954.

Chief Robert V. Murray testified that he had received a number of reports from Thoman regarding petitioner, and he relayed instructions from the United States Attorney to Thoman.

Thereafter, over objection, the Court admitted the testi-

mony of petitioner given at a hearing on a motion for suppression and return of seized evidence, in which petitioner had testified, over objection and at the direction of the Court, that he had given Thoman money for protection of people engaged in the numbers game.

Petitioner moved for judgment of acquittal, and the Court denied the motion. The petitioner then offered the letter which Thoman received from Prather, but the Court refused to admit it in evidence. Whereupon the defense rested.

The jury returned a verdict of guilty on all three counts, and the Court sentenced petitioner to 1½ to 4½ years on each count to run concurrently.

The Circuit Court of Appeals affirmed per curiam. (App. B), *infra*, p. 18.

REASONS FOR GRANTING THE WRIT

The questions involved herein concern matters of importance in the administration of the criminal laws in the federal courts: the admissibility of evidence of separate offenses, and prosecution's reference to such evidence in argument to jury; and the admissibility at trial of incriminating testimony given by defendant on hearing on a pretrial motion, at which hearing such testimony was given at direction of court, over objection, and without claim of privilege against self-incrimination.

I

Admission of Lottery Records Seized From Appellant at the Time of His Arrest and Prosecutor's Argument Concerning Them

When Captain Layton was testifying, the prosecutor handed him a large number of papers which he, Layton, had seized from petitioner at the time of the arrest. Petitioner moved for a mistrial (R 40) on the grounds that these were evidence of a separate and distinct offense and

were irrelevant to the issues of the case on trial. The prosecutor contended he was introducing them for the purpose of showing motive, design, and intent. The Court denied petitioner's motion, and the witness proceeded to examine the pieces of paper in the presence of the jury (R 41). Petitioner again objected and was overruled (R 42). After the witness examined these papers, he was permitted to testify that they indicated for one day a gross business of $4,049.12, and a net win by petitioner of $2,525.12 (R 43).

Petitioner again moved for a mistrial on the ground that these papers were not necessary to prove any issue in this case, and that they were being placed in evidence for the purpose of influencing the jury by showing that petitioner was a large numbers operator. Petitioner made the further point that it was admitted that he gave the money to Thoman for the purpose testified to by him, and that, therefore, there was no necessity for showing intent, design, or motive. The Court again denied the motion, and the papers were passed to the jury and examined by it (R 44-45).

It is submitted that the reasons urged on the lower court are cogent and elaboration would serve no useful purpose.

In addressing the jury, counsel for petitioner stated that petitioner was just a little fellow, but there were those who loved him; that petitioner was a human being and subject to human frailties; that the prosecutor had introduced into evidence those papers to show that petitioner was a gambler, and that in one day petitioner had taken in $2,000.00, so that the jury could say to itself that petitioner was a big numbers operator. Counsel urged the jury to not forget that petitioner was not charged with gambling (R 61).

When the prosecutor addressed the jury in rebuttal, he stated that petitioner was not a little fellow; that petitioner wanted to protect a booming business; that the booming business was evidenced by the net amount; that the gross was over $4,000.00 and the net amount was something like $2,512.00 on September 14, 1954 (R 62).

Apparently the prosecutor had forgotten the reason for which he had offered the papers, and was now using them for the very purpose which petitioner had urged the Court was the prosecutor's true purpose.

In these remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse prejudice.

See *Vierick* v. *United States*, 318 U.S. 237.

II

Admission of Incriminating Testimony Given on Pretrial Motion

Some months before the trial, another judge held a hearing on petitioner's motion for the return of certain money and an automobile seized from petitioner at the time of his arrest. Petitioner had filed an affidavit claiming ownership of certain money (not involved in this case) and an automobile. The petitioner had made no claim for the money which was given to Thoman.

Petitioner was at that hearing called to the stand only for the purpose of establishing ownership of these items, because the judge felt that the affidavit was insufficient.

After testifying to the ownership, the prosecutor, over objection, was permitted to question, and petitioner was required to answer, as to the reason he had given money to Thoman

At the trial, the court admitted over objection, the testimony given by petitioner at that hearing: (R 46 *et seq.*)

MR. TROXELL: At this time I should like to have the Court take judicial notice of a document, which consists—

MR. SITNICK: If Your Honor please, if counsel is going to talk about that, we ought to approach the bench.

(At the bench:)

MR. TROXELL: I should like to make this proffer in support of my request that the Court take judicial notice

of this. This is a transcript of a hearing on November 19, 1954, before Judge Letts.

. . . . . .

MR. TROXELL: This hearing was on November 19, 1954. It was reported by an Official Court Reporter of this Court, Jeanette Rawls—I don't know whether that is Miss or Mrs. And it was in the matter of the United States against Othello Washington, Criminal Number 977-54. This was a hearing on the motion to suppress certain money and a car. And during the course of the hearing Judge Letts required a showing of standing, which required that the defendant take the stand to testify.

During the course of the cross examination it was necessary for the Government to distinguish between what was being suppressed, the $150, and what was found at the time of the arrest in the possession of Thoman, that is, $250. It had to be made clear so that the Court wouldn't suppress some evidence, you see. The $150 was of no consequence; that was personal money.

But we had to ask questions to distinguish between the bribe money and the other, because if there had merely been an order suppressing the money, it might have struck both ways. So it was necessary for us to examine the defendant Othello Washington at that time regarding the distinction between the $150 and the $250, which was the bribe.

At this time I ask the Court to take judicial notice of that portion of the record which contains the direct and the cross examination of Othello Washington on that occasion.

THE COURT: Well, now, when you ask me to take judicial notice of it, you want to read it to the jury?

MR. TROXELL: Oh, yes, yes.

THE COURT: What do you say?

MR. LICHTENBERG: I say first of all that we are shadow boxing when counsel for the Government says that he had to ask questions to determine whether the money on the seat was the same money as the money that was in Lieutenant Thoman's pocket.

Secondly, we had objected to this line of questioning and Judge Letts overruled the objection.

The only point in putting the defendant on the stand was, as Judge Letts had said, that the affidavit alleging ownership was not sufficient in his opinion. And in order to prove the ownership I had to put the defendant on the stand.

When I put him on the stand—and I don't blame counsel for the Government for trying to go forward—I may have done the same thing, too—but it is not properly admissible.

THE COURT: I think it is admissible.

MR. SITNICK: May I say one other thing, Your Honor?

This man was testifying under compulsion, and one of the essential elements—

MR. TROXELL: I can't hear.

THE COURT: He says he was testifying under compulsion.

MR. SITNICK: And one of the essential elements of the thing is that there has to be penalty. (Counsel actually stated "that it has to be voluntary"). You can't by any stretch of the imagination say it is voluntary when the Court orders the man to.

MR. TROXELL: It wasn't under compulsion at all. He was put on the stand by his attorney to establish standing.

MR. LICHTENBERG: Only one purpose.

MR. SITNICK: His attorney asked him no question concerning anything relating to money given to Thoman.

THE COURT: He voluntarily took the stand.

MR. LICHTENBERG: He had to take the stand to prove the ownership of that money. It has nothing to do with the bribe money, if Your Honor please. If you will examine the testimony I think that you may come to a different determination on it.

THE COURT: I looked into the question because it was raised yesterday. I think it is admissable. I will permit it to be received.

(Transcript of Proceedings in Criminal No. 977-54, No-

vember 19, 1954, which was later marked for identification, was received in evidence.)

MR.TROXELL: I might add that the Milton case—and I have the citation in my papers—supports the proposition that a transcript of a prior proceeding is admissible in evidence.

THE COURT: You may read it.

MR. TROXELL: Thank you.

(In open court:)

MR. TROXELL: Should this be marked as being received? May this be marked Government's Exhibit 8 for identification.

THE DEPUTY CLERK: Government's Exhibit Number 8 marked for identification.

MR. TROXELL: If it please the Court, may I state for the record that this is a transcript of a hearing before a Judge of this Court on November 19, 1954, in the matter of United States against Othello Washington, Criminal Number 977-54.

I should like to read page 37 and following of that transcript.

MR. SITNICK: May it please the Court, I think the jury ought to be told that this was not a trial but a proceeding in which the defendant was seeking to get back his automobile and a certain sum of money on the seat of the automobile.

THE COURT: Very well.

MR. LICHTENBERG: And that the Court granted the order to return it.

THE COURT: Very well.

MR. TROXELL: First, I will read the first part of the page:

"THE COURT: It hasn't been proved.

"MR. LICHTENBERG: If Your Honor please, unless the ruling has been changed—and I have appeared before Your Honor many times in connection with motions to suppress—and it has always been or the question has never

been raised, let me say, that when the affidavit is filed showing that it is his automobile, that it belongs to him and there is no evidence to the contrary but if Your Honor wants me to prove it, I will prove it.

"THE COURT: He comes here into this court to prove what he stated in his affidavit and hasn't done it. No one has.

"MR. LICHTENBERG: Very well. Will Your Honor permit me to put the defendant on the stand?

"THE COURT: Yes.

"Thereupon,

OTHELLO WASHINGTON

was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION

"BY MR. LICHTENBERG:

"Q Your full name is Othello Washington?

"A Yes.

"Q And you are the defendant in this case?

"A Yes.

"Q Do you own a 1950 Chrysler automobile?

"A Yes.

"Q That was left in Rock Creek Park on September 14?

"A Yes.

"Q And it belongs to you?

"A That is right.

"MR. LICHTENBERG: Your witness.

"MR. TROXELL: I take it that, based upon the direct examination"—

MR. LICHTENBERG: If we are just going to have the testimony, I think it should be the questions and answers.

MR. TROXELL: All right. Well, of course, as Mr. Litchenberg suggested, the context should be shown. And Mr. Lichtenberg makes some remarks—

MR. LICHTENBERG: If Your Honor please, I think Your Honor has ruled.

THE COURT: Just read the questions and answers.

MR. TROXELL: Yes.

"CROSS EXAMINATION

"BY MR. TROXELL:

"Q You did give Captain Thoman some money that same evening?

"A Yes—

"MR. LICHTENBERG: Just a moment. If Your Honor"—

MR. LICHTENBERG: If Your Honor please, that has nothing to do with the next question.

MR. TROXELL: It is in context, Your Honor.

THE COURT: I think you had better confine your reading to the questions and answers.

MR. TROXELL: Yes.

"MR. TROXELL: I would like to have some definition of what money he is concerned with."

And then there is an objection and the objection is overruled.

"BY MR. TROXELL:

"Q Did you give Captain Thoman some money that evening?

"A Yes.

"Q Is that the money you are talking about now that was seized from you?

"A No. The money that I am talking about was on the seat of the automobile.

"Q You had given Captain Thoman $250 earlier, before you were arrested, is that right?

"A $260.

"Q "260; and this $150 you are talking about is money other than the money that you gave Captain Thoman; is that correct?

"A That is right.

"Q Why did you give Captain Thoman $260 that evening?"

Mr. Lichtenberg objected and the Court overruled the objection, and there is further colloquy. The further objection was overruled.

MR. LICHTENBERG: If Your Honor please—

THE COURT: Just read the questions and answers.

MR. TROXELL: (Reading)

"Q What was your purpose in giving the $260 to Captain Thoman that evening?

"A The purpose was to pay him for something that he had promised to do for me.

"Q And what was that that he had promised to do for you?"

"THE WITNESS: He had promised to protect some people in numbers.

BY MR. TROXELL:

"Q What people?

"A People engaged in the numbers.

"Q Who were these people?

"A A Joseph Chase.

"Q And who else?

"A That was all.

"Q Is it not a fact that you paid him that money to protect your own numbers business with Joseph Chase?

"A Only for Joseph Chase."

It is respectfully submitted that the answers elicited from petitioner were not voluntary, and therefore could not not constitute a valid confession; A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. See *Ziang Sung Wan* v. *United States*, 266 U. S. 1. Furthermore, they had no pertinency to the subject matter of his motion; and certainly were not within the scope of direct examination.

An examination of the questions propounded to petitioner by the prosecutor so clearly shows the questions to have been irrelevant to the issues then before the court, that the

court should sua sponte have stopped the prosecutor. The real purpose of the questions was to have petitioner incriminate himself and to have the advantage of this at the trial.

The gross unfairness of eliciting incriminatory statements under such circumstances is obvious.

A direction by the trial judge to answer a question, after overruling objection, carries with it an element of compulsion, an element understood by a witness far more than any rights he may have under the Fifth Amendment. His answers in such circumstances and in that kind of an atmosphere ought not to be usable against him at a later time.

The Amendment prohibits compulsion,[1] and contains no requirements that a witness seek shelter in the Amendment when judicially coerced to incriminate himself.[2] He does not waive any constitutional rights he may have by submission to an order or direction of a judge.[3]

Petitioner urges that each of the errors alleged is in and of itself sufficient to require reversal of the conviction. It cannot be said that they, or either of them, did not gravely influence the jury in its verdict.

As the Court stated in *Kotteakos* v. *United States*, 328 U.S. 750:

> "* * * The question is, not were they (jury) right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect that error had, or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own in the total setting * * *"

---

[1] Amendment V
* * * nor shall he be compelled in any criminal case to be a witness against himself, * * *

[2] Under the implied coercion here presented, no waiver could be intended or effected. See *Amos* v. *United States*, 255 U. S. 313.

[3] Petitioner testified in submission to the authority of the judge, and not with an understanding and intentional waiver of a constitutional right. Cf. *Johnson* v. *United States*, 333 U. S. 10.

"The inquiry cannot be merely whether there was enough to support the issue, apart from the phase affected by the error. It is rather even so whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

STATUTE INVOLVED

Section 22-704, D. C. Code (1951 Ed.), (Corrupt influence-Officials):

> Whosoever corruptly, directly or indirectly, gives any money, or other bribe, present, reward, promise, contract, obligation, or security for the payment of any money, present, reward, or thing of value to any ministerial, administrative, executive, or judicial officer of the District of Columbia or any employee or other person acting in any capacity for the District of Columbia, or any agency thereof, either before or after he is qualified, with intent to influence his action on any matter which is then pending, or may by law come or be brought before him in his official capacity, or to cause him to execute any of the powers in him vested, or to perform any duties of him required, with partiality or favor, or otherwise than is required by law, or in consideration that such officer being authorized in the line of his duty to contract for any advertising or for the furnishing of any labor or material, shall directly or indirectly arrange to receive or shall receive, or shall withhold from the parties so contracted with, any portion of the contract price, whether that price be fixed by law or by agreement, or in consideration that such officer has nominated or appointed any person to any office or exercised any power in him vested, or performed any duty of him required, with partiality or favor, or otherwise contrary to law; and whosoever, being such an officer, shall receive any such money, bribe, present, or reward, promise, contract, obligation, or security, with intent or for the purpose or consideration aforesaid shall be deemed guilty of bribery and upon conviction thereof shall be punished by imprisonment for a term not less than six months nor more than five years.
>
> Whosoever corrupts or attempts, directly or indirectly, to corrupt any special master, auditor, juror, arbitrator, umpire, or referee, by giving, offering, or promising any gift or gratuity whatever, with intent to bias the opinion, or influence the decision of such officer, in relation to any matter pending in the court,

or before an inquest, or for the decision of which such arbitrator, umpire, or referee has been chosen or appointed, and every official who receives, or offers or agrees to receive, a bribe in any of the cases above mentioned shall be guilty of bribery and upon conviction thereof shall be punished as hereinbefore provided.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,657

OTHELLO WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided March 28, 1957

Mr. Joseph Sitnick, with whom *Mr. William R. Lichtenberg* was on the brief, for appellant.

Mr. Harold H. Greene, Assistant United States Attorney, with whom *Messrs. Oliver Gasch,* United States Attorney, *Edward P. Troxell,* Principal Assistant United States Attorney, *Lewis Carroll* and *John W. Kern, III,* Assistant United States Attorneys, were on the brief, for appellee.

Before WILBUR K. MILLER, BASTIAN and BURGER, Circuit Judges.

PER CURIAM: This appeal is from a conviction of bribery (three counts). We find no error.

Affirmed.

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Statute:

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